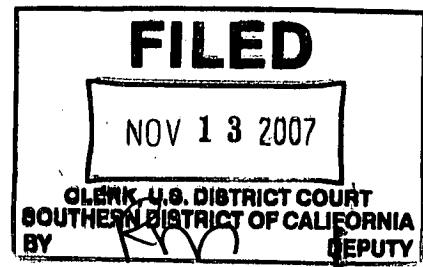


JAMES H Cunningham III
 California Men's Colony State Prison
 P.O. BOX 8101 (62)
 San Luis Obispo, CA 93409-8101
 IN PRO PER

2254	✓ 1983
FILING FEE PAID	
Yes	No ✓
HP MOTION FILED	
Yes ✓	No
COPIES SENT TO	
Chair ✓	ProSe



'07CV 2183 DMS RBB

UNITED STATES District Court
 SOUTHERN District of CALIFORNIA

James Cunningham
 Petitioner,

v.

John Marshall (Warden CMC)
 Respondent

MOTION for STAY AND ABEYANCE
 OF FEDERAL HABEAS CORPUS
 PETITION TO EXHAUST ADDITIONAL
 UNEXHAUSTED CLAIMS IN
 THE STATE COURTS.

Petitioner, James Cunningham in proper, respectfully moves this Honorable Court for a stay and abeyance of his Federal habeas petition, while petitioner goes back to the State Court to exhaust additional unexhausted claims that were not included in the petition in wake of the U.S. Supreme Court recent decision in - Rhines v. Weber 2005 124 S.Ct. 1528.

This motion is based on the facts and memorandum of authorities stating why the District court should grant the petitioners stay and abeyance.

MEMORANDUM Points and Authorities

A Federal Court has NO power to hear a mixed Petition, and Must either 1). Dismiss the entire Petition without Prejudice (meaning You can file again without running into the successive Petition Bar); or 2). Allow the Petitioner to dismiss the UNEXHAUSTED claims and go forward in federal Court with an AMENDED Petition containing ONLY the EXHAUSTED claims.

Making ONE of the claims creates a dilemma for the federal Petitioner. The problem with alternative (2) is that it requires the PERMANENT dismissal of unexhausted claims /or unexhausted facts within otherwise exhausted claims) which might upon EXHAUSTION, have a better chance of success than the already exhausted claims.

The Problem with (1) is that although the dismissal is without Prejudice the time spent in federal Court prior to the dismissal is not tolled against the AEDPA Statute of Limitations.

Usually, by the time a federal Court gets around to issuing a ruling forcing the petitioner to deal with a mixed petition, what ever time remained on the Statute of Limitation will have have been used up, so that it will be impossible to go back to the state court, exhaust and come back to federal Court without the new federal Petition being barred by Statute of Limitations.

In an effort to deal with the dilemma lower federal courts began offering the Petitioner "Stay and ABEYANCE" as a third

Alternative allowing the petitioner to stay the federal petition the Petitioner returned to the state court to exhaust his unexhausted claims (see, e.g. Kelly v. Small, 315 F. 3d 1063 (9th Cir 2003)

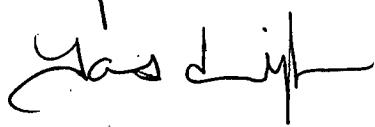
stay and abeyance allows the Petitioner to return to the state court to exhaust additional unexhausted claims, but as long as he files the state exhausted claims, promptly of his unexhausted claims and promptly returns to Federal court after exhaustion is completed the original federal Petition will be there awaiting and the Petition can simply move to amend the stayed Petition to add the newly exhausted claims.

The U.S. Supreme Court upheld the discretion of a district court judge to order stay and abeyance as an alternative to dismissal (Rhines v. Weber (2005) 124 S. Ct. 1528).

The unexhausted claims are newly discovered and are "Potentially Meritorious" because it will reduce Petitioner's crime and good cause for the failure to exhaust the unexhausted claims before filing in federal court is shown based on the fact that these facts were not known and could not at any time be presented at an earlier time (see in People v. Shipman (1965) 42 Cal. Rptr. 1; In re Clark 21 Cal. Rptr. 2d 509.

Petitioner here by respectfully request that the District Court order
a stay and abeyance of His Federal habeas Corpus Petition to Exhaust
additional unexhausted claims, while Petitioner pictured to state court
to exhaust his unexhausted claims under (Kelly v. Small, supra).

I, James Cunningham declare under Penalty of Perjury that
the foregoing is true and correct to the best of MY Knowledge
and beliefs. EXCITED ON NOVEMBER 2, 2007 at CMR SAN LUIS
OBISPO, Ca. #3409-8101

Respectfully Submitted


Petitioner IN Pro Per

To Legal Officials:

INTRODUCTION

9-7-2007

I, JAMES H. CUNNINGHAM AM SEEKING ADVICE, SUGGESTION
REFERENCE, ALLIANCE ANY TYPE OF HELP DEALING WITH
MY CASE. HERE IS MY STORY PLEASE BEAR WITH ME!

I'M JUST TRYING TO TOUCH LEGAL BASES ON MY APPEALS
CASE THAT'S IN DYING NEED OF LEGAL SUPPORT, I CAN'T DO
IT ALONE. A JURY FOUND ME GUILTY OF ASSAULT WITH A
FIREARM (PEN. CODE 245, SUBD.(A)(2) POSSESSION OF A DEADLY WEAPON
(12020. SUBD.(A)(1)) THE JURY ALSO FOUND ME GUILTY OF USING A
FIREARM DURING THE COMMISSION OF (12022.5 SUBD.(A)). I WAS
FOUND INNOCENT OF THE (459) SUBD.

IN THE SECOND PORTION OF THE BULLY TRIAL MY ATTORNEY THOUGHT
IT WOULD BE WISE ON THE JUDGE TO LET HIS COURT ROOM TAKE CARE OF
20 AND 10 yr. OLD STRIKE I SIGN FOR IT BUT WHEN IT CAME DOWN TO
SENTENCING THE JUDGE DECLINE TOO. I PLEAD GUILTY TO (667.5 SUBD.(A)(1))
668.11927 SUBD.(C) AND A PRIOR STRIKE CONVICTION (667 SUBDS.(B)-(I))
668.1170.121 STEMMING FROM A 1983 ROBBERY CONVICTION.

THE TRIAL COURT SENTENCED I, JAMES H. CUNNINGHAM TO 12 yrs. IN
STATE PRISON. I'M PRESENTLY INCARCERATED IN CALIFORNIA MEN'S
COLONY STATE PRISON P.O. 8101 SAN LUIS CA 93409-8101.

I WAS REPRESENT DURING TRIAL DEPUTY ATTORNEY MR. STACI BULLY
WAS MY COUNSEL HIS OFFICE IS LOCATED AT PUBLIC DEFENDERS
233 A ST. ELCAJON CA. MY SUPERIOR COURT CASE # IS SCE243638.

MY ATTORNEY FILED FOR MY APPEAL IN A TIMELY FASHION 5-13-05.
A FEW MONTHS LATER I WAS CONTACTED APPELLATE DEFENDERS INC.
LOCATED AT 555 WEST BEECH ST. SUITE 300 SAN DIEGO CA.

2 of 6

92101-2939. PH# (619)-696-0282 automated attended (619)-699-0284

www.adl.sandiego.com from there Ms. SUSAN KEISER WAS
Appointed to COUNSEL I. MY CASE NUMBER IS D046320.

Ms. KEISER is located at 3453 INGRAM ST. #85 SAN DIEGO CA.
from there MS. KEISER PREPARE MY APPEAL CASE through her
RESEARCH SHE PREPARED MY OPENING BRIEF dated 9-6-2005.
WHEN SHE WENT INTO APPEALS COURT WHERE SHE WAS DENIED
ON THE APPEAL though SHE STATED WE HAD ARGUMENT THAT WAS
RELEVANT SHE ALSO WAS OFFER MORE ARGUMENT but the
APPELLATE COURT STOOD AFFIRMED WITH JUDGE WILLIAM MC GRATH,
OF THE SUPERIOR COURT OF SAN DIEGO.

THE APPELLATE COURT GAVE NO OPINION about the opening brief
IT WAS A UNPUBLISHED OPINION. ON APPEAL PETITIONER SHOWS ERROR
WHERE THE TRIAL COURT ERRED IN EXCLUDING EVIDENCE.

I. WHETHER: THE TRIAL COURT BY DENYING APPELLANT'S REQUEST
TO CROSS-EXAMINE REBECCA KNOX REGARDING HER PRIOR DOMESTIC
VIOLENCE ACCUSATIONS AGAINST HER HUSBAND, CHRISTOPHER KNOX
SHE LATER RECALTED AND THEREBY VIOLATED APPELLANT'S STATE
AND FEDERAL CONSTITUTIONAL RIGHTS TO PRESENT A DEFENSE
AND TO CROSS-EXAMINE WITNESSES AGAINST HIM.

SO MY CONCERN IS (A) DENIED ARGUMENT (B) THE RIGHT TO PRESENT
EVIDENCE AND TO CROSS-EXAMINE (C) LEGAL STANDARDS IMPEACHMENT
EVIDENCE. CAN I HAVE PENAL CODES TO COMBAT THOSE ISSUES
WITH? II AND WHETHER: THE TRIAL COURT ERRED IN GIVING CALIF
NUMBER 2.52 THE STATUTORY FLIGHT INSTRUCTION, OVER DEFENCE

3 of 6

objection thereof? Violating Appellant's due process rights.

I would like too know whether law governing flight instruction has any merit. Defence says objections to pattern flight as well, including there was no flight that indicated consciousness of guilt. Also did the pattern instruction required modification and preliminary fact find in this CASE.

whether: A. CAN I HAVE A SUMMARY OF ARGUMENT & QUOTATION

B. LAW GOVERNING FLIGHT INSTRUCTIONS

C. HOW TO SUBMIT APPLICATION TO THE INSTANT CASE

III whether: The court ERRED BY DENYING THE DEFENSE REQUEST TO INSTRUCT WITH CALJIC NUMBER 12.50 WHEN THE EVIDENCE WARRANT SUCH INSTRUCTION, AND THE FAILURE TO INSTRUCT IMPERMISSIBLY REDUCED THE PROSECUTION'S THE BURDEN OF PROOF AND VIOLATED APPELLANT'S DUE PROCESS AND TRIAL RIGHTS. A. HOW CAN I CONFRONT THE SUMMARY OF ARGUMENT

B. DEFENSE REQUEST FOR CALJIC NUMBER 12.50

C. LAW GOVERNING SELF-DEFENCE AS AFFIRMATIVE

TO PENAL CODE SECTION 12021

D. WHAT ARE THE STANDARD OF REVIEW AND PREJUDICE.

THOSE I II III. WHERE THE THREE SERIOUS ISSUES APPELLATE COUNSEL SOUGHT OUT TO BE REVERSED BUT WAS IGNORED BY APPELLATE COURT. SINCE NOT GETTING ANY KIND OF OPINION TO THESE SERIOUS ISSUES NOT BEING ADDRESSED WITH CERTIFICATE BY APPEALS COURT. MY COUNSEL PETITION FOR SATISFACTORIALLY TOWERS

4 of 6

California Supreme Court by preparing a review. Counsel was determined to show triers of fact that all these issues are not susceptible to harmless error review.

So counsel Ms. Kesiier prepare a petition for the state Supreme Court. The unpublished opinion for review was done April 3, 2006 C:\...\2004 CASES\ CUNNINGHAM.Pfr. Her conclusion for the matters should of been granted what do you think?

But to my unpleasant surprise review was denied by California Supreme Court with out reason too Petitioner 5-17-06 from there I received a letter certified that my counsel her self could not represent me any further in my case. She advised me to file for a extension on that I, did have good argument and good luck there was no tell of reason, I had no one to be tentative to my case.

I took it upon myself to go forward with a Writ of Habeas Corpus in the United States Southern District California Supreme Court. Located at 88 front st. Suite 4290 San Diego CA 92101-8900.

On or about I received legal mail stating that I might have or not exhausted my state remedies Civil No. 06-2168 JM(CAB) So from there I wrote AS PROSE NOV 2, 2006 too U.S.S.D.C and ask for my case to be dismiss without prejudice.

So that I could go back into state supreme court and exhaust all my brought up issues Nov 13, 2006 Clerk of U.S. district Court Southern Division inform me of the filing.

CASE 3:06-

cv-02168- On September 29, 2006, Petitioner, a state prisoner proceeding prose,

5 of 6

filed a petition for Writ of Habeas Corpus pursuant to 28 U.S.C § 2254.

On October 17, 2006, the Court sent Petitioner a document entitled "Notice regarding Possible Failure to Exhaust and ONE YEAR statute of limitations" which notified Petitioner of his obligation

under 28 U.S.C § 2254 to exhaust his state court remedies and the ONE-YEAR statute of limitation, contained in 28 U.S.C § 2244, which applies to Petitioner filed pursuant to 28 U.S.C. § 2254.

Motion To Dismiss

The notice sent to Petitioner stated that Petitioner was not required to take any action and that the Court had not yet determined whether ANY of MY claims were unexhausted. Nevertheless on November 13, 2006, I the Petitioner filed a notice and requested for dismissal without prejudice so to exhaust Habeas Corpus claims.

Petitioner states in his declaration in support of his motion that "Upon further examination of MY claim, I have found that I am within the statute of limitation and I HAVE, I believe AN UNEXHAUSTED CLAIM IN MY CLAIM TWO" and that I believe-s it is in the best interest of all concern that I attempt to exhaust MY CLAIM TWO with the State Court. Based on the assertions Petitioner makes in his declaration, the Court grants Petitioner motion to dismiss his petition without Prejudice.

Motion to Proceed in forma Pauperis

I, also filed a Motion to proceed in forma pauperis in response to the Court's October dismissal order. Because the court has granted Petitioner's motion to dismiss his case without

6 of 6

PREJUDICE THE COURT DENIED MY MOTION TO PROCEED IN FORMA PAUPERIS AS
MOOT. IT WAS DONE ON 12-4-2006 BY UNITED STATES DISTRICT JUDGE,
JEFFREY T MILLER. FROM THERE I PREPARED A HABEAS CORPUS. MIND YOU
THAT I HAVE NO REAL LEGAL ELIGIBLE SKILLS GOING INTO CAL STATE SUPREME
COURT. I TOOK SOME ADVICE GOT WHAT I COULD FROM THE LIBRARY COMPUTER.
WELL, I DID WHAT I COULD AND PUT A STATE HABEAS CORPUS TOGETHER AND
SENT IT OFF IN MARCH, 2007. I GOT A REPLY THAT IT WAS FILED APRIL 9TH 2007.
FROM THERE I RECEIVE LEGAL MAIL INFORMING ME THAT MY PETITION FOR
WRIT OF HABEAS CORPUS WAS DENIED. (ACCEPT REFERALS TO "PRO-BONO'S")
THE COURT OFFER ME TO SEE (IN RE WALTERS (1995) 62 CAL.2D 218;
IN RE DIXON (1953) 41 CAL.2D 756; IN RE SWAIN (1949) 34 CAL.2D
300, 3004; PEOPLE V. DUVALL (1995) 9TH CAL.4TH 464, 474; IN RE LINDLEY (1949)
29 CAL.2D 709. I CAN TELL YOU I HAVE READ THE 9TH & 4TH BUT... I
STILL NEED THE BREAKDOWN OF THE STATEMENTS. IF I'M SOMEWHAT A LITTLE
CORRECT TOO MY KNOWLEDGE I'M LATE WITH THE APPEAL ARGUMENTS AND
MOTIONS SHOULD OF BEEN BROUGHT UP IN THE FIRST LEVEL OF TRIAL.

PLEASE! CORRECT ME IF I'M WRONG would you kindly give me a road map too freedom an Justice? I'm really hoping for your counsel and direction I don't feel I can do it without support and ANY type of COUNSEL and direction I feel it's key. HERE is some of MY supporting CASES, rules, Authorities: CAL. CONST article 17 § 15 Woodford v GARCEAU (2003) 538 U.S. 202, 207 SAFFLE v Parks (1990) 494 U.S. 484, 495 Chambers v Mississippi (1973) 410 U.S. 234, 295 TENNESSEE v. STREET (1992) 491 U.S. 409, 415 White v. Illinois (1992) 502 U.S. 346, 355 Dutton v. EVANS (1970) 400 U.S. 74, 89 White v. Illinois (1992) 502 U.S. 346, 355 Pointer v. TEXAS (Sixth & Fourteenth amendment, U.S. CONST., Crawford & Washington (2004) 541 U.S. 36, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 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893, 894, 895, 896, 897, 898, 899, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 991, 992, 993, 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S151640

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re JAMES CUNNINGHAM on Habeas Corpus

The petition for writ of habeas corpus is denied. (See *In re Waltreus* (1965) 62 Cal.2d 218; *In re Dixon* (1953) 41 Cal.2d 756; *In re Swain* (1949) 34 Cal.2d 300, 304; *People v. Duvall* (1995) 9 Cal.4th 464, 474; *In re Lindley* (1947) 29 Cal.2d 709.)

**SUPREME COURT
FILED**

AUG 22 2007

Frederick K. Ohrnigh Clerk

DEPUTY

GEORGE

Chief Justice